FILE COPY

FILED
SEP 3 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 399 17

EINAR RASMUSSEN, *Petitioner*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JACK WASSERMAN,
Attorney for the Petitioner,
Warner Building,
Washington 4, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Ceballos v. *Shaughnessy*, No. 71, October Term, 1956	2, 7
Curtiss-Wright Corp. v. *United States*, 299 U.S. 304 (1936)	9
DiGirolamo v. *Acheson*, 101 F. Supp. 380 (Dist. of Col., 1951)	5
Gay v. *Brownell*, 120 F. Supp. 319 (D.C. Puerto Rico, 1954)	5
Hong v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953)	5
Moser v. *United States*, 341 U.S. 41 (1951)	4, 5, 6, 10
McGrath v. *Kristensen*, 340 U.S. 162 (1950)	9
Petition of Ajlouny, 77 F. Supp. 327 (E.D. Mich. 1948)	9
Price v. *Johnston*, 334 U.S. 266 (1948)	8
Rueff v. *Brownell*, 116 F. Supp. 298 (D.C.N.J. 1953)	5
Schachtman v. *Dulles*, 225 F. 2d 938 (C.A.D.C. 1955)	9
Staten Island Hygenia Ice and Cold Storage Co. v. *United States*, 85 F. 2d 68 (C.A. 2, 1936)	5
Stockstrom v. *Commissioner*, 190 F. 2d 283 (C.A. D.C. 51)	5
The Rita Maersk, 52 F. Supp. 56 (D.C. Mass. 1953)	8
The Three Friends, 166 U.S. 1 (1896)	9
U. S. ex rel Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	8
Uyeno v. *Acheson*, 96 F. Supp. 510 (W.D. Wash. 1910)	5

Statutes and Regulations:

Immigration Act of 1924:

Section 13(c), 8 U.S.C. 213(c)	3, 11
Section 28(c), 8 U.S.C. 224(c)	11
Immigration and Nationality Act	12
Section 315, 8 U.S.C. 1426	12

Selective Training and Service Act of 1940:

Section 3(a), 50 U.S.C. App. 303(a)	3, 11
32 C.F.R. Cum. Supp. (1944 Ed.),	2, 8, 12
601.2(c)	8, 12
622.43(b)	2, 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No.

EINAR RASMUSSEN, *Petitioner*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia reversing a judgment of the District Court declaring that petitioner is eligible for American citizenship and is a permanent resident of the United States.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 13 of the Appendix herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 15 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the petitioner, a citizen of Denmark who claimed draft exemption as a neutral alien in 1943 upon the erroneous advice given him by his draft board and who subsequently volunteered for induction into the Armed Forces in the same year and prior to the Battle of the Bulge, was ineligible for American citizenship and hence an inadmissible alien in 1946 when he was granted permanent residence by the joint action of the State and Justice Department.

2. Whether by the mere signing of an application by an alien for relief from military service, the petitioner forfeited his right to naturalization and became ineligible for citizenship where it does not appear that he was actually relieved from military service as required by the law and the rules and regulations of the Selective Service System (32 C.F.R. 622.43b Cum. Supp., 1944 Ed.). This is the identical issue presented by *Ceballos* v. *Shaughnessy* (No. 71, October Term, 1956) in which certiorari was granted on June 11, 1956.

3. Whether the Court of Appeals properly construed the pleadings herein strictly against petitioner.

4. Whether the District Court properly concluded that petitioner herein was not a citizen of a neutral country and that he was therefore eligible for American citizenship.

Statutes Involved

The applicable statutes are set forth in Appendix A herein at page 11.

Statement

Petitioner is a native and citizen of Denmark and is the husband of an American citizen. His two minor stepchildren and his wife depend upon him for support. Petitioner came to the United States illegally on August 6, 1929. On April 26, 1943, he advised his draft board that he desired to serve in our armed forces if he could become an American citizen, otherwise he did not. He was erroneously advised by his draft board that because of his illegal entry he could not become a citizen by army service. He thereupon claimed exemption from service as a neutral alien pursuant to 50 U.S.C. App. 303(a). A few months later, on October 4, 1943, when the war was still raging and before the Battle of the Bulge, petitioner discovered that he could become a citizen by entering the armed forces. He submitted to induction and was rejected on physical grounds (R. 8).

In 1944 after the institution of deportation proceedings, petitioner was granted permission to proceed to Canada in order to adjust his immigration status pursuant to a procedure known as preexamination (8 C.F.R. 1949 Ed., Part 142). On January 16, 1946, an appropriate immigration visa was issued to him, and he reentered the United States as a permanent resident (R. 8). In 1947 the immigration authorities asserted that they made a mistake readmitting petitioner for permanent residence, that he was ineligible to citizenship pursuant to 50 U.S.C. App. 303(a), was therefore inadmissible for permanent residence under 8 U.S.C. 213 and was accordingly deportable. The present deportation order was entered on June 30, 1948, upon this theory.

Thereafter litigation followed which resulted in a determination that the issues herein could be litigated in a declaratory judgment action (350 U.S. 806).

The District Court ruled on May 14, 1953 that the petitioner was not subject to deportation, holding that as a citizen of a country which was not neutral, he did not incur the disability of citizenship ineligibility under 50 U.S.C. App. 303(a) (R. 12).

At the trial the petitioner offered to prove through documentary evidence that he had been induced to file his draft exemption claim in April 1943 under mistake and upon the advice of his draft board that he could not become an American citizen by serving in our Armed Forces (R. 45-46). As contended by the petitioner in his complaint and at the present trial, a few months later in October 1943 when petitioner discovered that he could become an American citizen, he offered to serve in our Armed Forces during hostilities and prior to the Battle of the Bulge. However, he was subsequently rejected on physical grounds. The District Court found it unnecessary to take evidence on the issue of mistake or to permit the petitioner to develop his case in view of the fact that judgment was rendered for the petitioner upon the ground that Denmark was not neutral.

Upon appeal the Court of Appeals ruled that the Selective Service determination regarding the status of Denmark was one which could not be attacked collaterally in the courts. It further held that the misinformation which the petitioner received from his draft board was not the type of mistake which existed in the case of *Moser* v. *United States*, 341 U.S. 41 (1951), and that therefore it was unnecessary to afford petitioner his day in court on this issue. It was further held that although the complaint asserted that the petitioner was not relieved from military service as a result of his application, that nevertheless since there was no definite offer to show that deferment from service was based upon another ground, the case would not be

remanded to ascertain the ground for deferment. Subsequent to the decision of the Court of Appeals on June 14, 1956, an order was entered on June 20, 1956 by the Court on its own motion staying the issuance of its mandate pending disposition by the Supreme Court of the case of *Ceballos* v. *Shaughnessy* in which certiorari was granted on June 11, 1956.

Reasons for Granting the Writ

1. The decision below is in conflict with *Moser* v. *United States*, 341 U.S. 41 (1951). In the instant case the petitioner offered to prove that he was lured into a misunderstanding of his right to apply for naturalization in the event of induction into our Armed Forces. He found himself in the position of an alien illegally in the United States who was faced with the possibility of entering our Armed Services, risking his life, and nevertheless being unable to obtain American citizenship. Three or four months later he discovered that he could become an American citizen by entering our Armed Forces, and prior to the Battle of the Bulge he offered to serve.

Where an individual has been misled or wronged by the Government officials, the courts have been free to hold that "the Government should always be a gentleman" and not take advantage of its error. *Strockstom* v. *Commissioner*, 190 F. 2d 283 (C.A.D.C. 1951); *Staten Island Hygenia Ice and Cold Storage Co.* v. *United States*, 85 F. 2d 68 (C.A. 2, 1936); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash. 1951); *DiGirolamo* v. *Acheson*, 101 F. Supp. 380-382 (Dist. of Col. 1951); *Moser* v. *United States*, 341 U.S. 41, (1951); *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953); *Gay* v. *Brownell*, 120 F. Supp. 319 (D.C. Puerto Rico, 1954); *Rueff* v. *Brownell*, 116 F. Supp. 298 (D.C.N.J. 1953).

In *Strockstom* v. *Commissioner*, 190 F. 2d 283 (C.A.D.C. 1951), the Court of Appeals ruled:

> "It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to ordinary fair play from tax officials. We regard as unconscionable the Commissioner's claim of authority to assess a tax in 1948 because of Strockstrom's failure to file a return for 1938, when the Commissioner himself was responsible for that failure."

In *Moser* v. *United States*, 341 U.S. 41 (1951), this Court found that the petitioner was understandably lulled into a misconception of the *legal* consequences of applying for exemption by the Government. It stated at page 47:

> "Petitioner did not knowingly and intentionally waive his rights of citizenship. In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness."

Certainly the instant case presents the type of mistake which should be recognized under the *Moser* case. The petitioner looked to the superior intelligence of his draft board to advise him on the issues of the legal consequences of entering our Armed Forces. He was misadvised, and, accordingly, claimed draft exemption under mistake. Rules of elementary fairness which were applied in the *Moser* case should likewise be applied here. As noted by the Court below, this issue is not only involved in this case, but has been presented in other cases, and there is need for clarification as to whether or not the principle of the *Moser* case is to be narrowly and strictly construed, or

whether it is to be applied to situations like that presented herein.

2. On June 20, 1956, the Court of Appeals entered an order staying the mandate herein until this Court's decision in *Ceballos v. Shaughnessy*, No. 71, October 1956 Term. It was thereby recognized that the issue presented herein is similar to that presented in the *Ceballos* case in which certiorari has been granted. The complaint herein alleges and the answer admits that the petitioner applied for relief as a neutral alien and was thereafter classified 4-A (over-age). It would thereby appear that the petitioner was never relieved from military service upon the ground of alienage. Accordingly, the issue presented here is the identical issue presented in the Ceballos case. It is submitted for the reasons elaborated more fully in the *Ceballos* petition for certiorari that the petitioner, who claimed draft exemption in April of 1943 and subsequently attempted to enter the Armed Forces in October of 1943, was not barred from American citizenship by reason of the mere filing of the draft exemption claim.

3. The record herein does not support a conclusion that petitioner was in fact exempt from military service upon the ground of alienage. All that can be asserted upon the basis of the record is that the petitioner's military service was deferred at first because of his age, and later was excused because of his defective vision. The Court of Appeals, however, as indicated in footnote 3 of its opinion (Appendix B herein, page 18), contrary both to the record below and to the usual rules for the construction of pleadings, has construed the pleadings strictly against the petitioner. The Court below assumed without warrant that the petitioner would be unable to prove his contention that he was not deferred on grounds of alienage, but merely because of over-age, a fact which has been admitted by the

answer herein. In *Price* v. *Johnston*, 334 U.S. 266, 291 (1948), this Court observed:

> "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."

The decision below flies in the face of this admonition by this Court.

4. Under its regulations the Selective Service System was required to conclude that Denmark was neutral only where it appeared that the country was neither an enemy country nor a cobelligerent [32 C.F.R. 601.2(c); Cum. Supp. 1944 Ed.; 6 F.R. 6825; 7 F.R. 10802]. The District Court found that under the stipulated facts herein Denmark was not a neutral country. It appears that the State Department took no position on this issue. The Office of Military Government for Germany listed Denmark as a cobelligerent during World War II (Military Government Law No. 3, Title 23). Alien property cases likewise recognize the belligerency of Denmark. *The Rita Maersk*, 52 F. Supp. 56 (D.C. Mass. 1953). Denmark had been invaded by the German Army on April 9, 1940, and thereafter our Allies treated Denmark as a belligerent, seizing its ships on the high seas as enemy property. Moreover, in 1941, we took possession of Greenland and utilized it as a military base. Thus for all purposes other than Selective Service, the United States recognized the belligerency of Denmark.

Here we are concerned, not with a political question, but with the interpretation and application of an agency regulation having the force and effect of law. *U.S. ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The Court of Appeals refused to decide whether the Selective Service System complied with its own regulations when it found Denmark to be neutral. Determining whether there has

been compliance with agency regulations is a normal and usual judicial function which the Court below improperly refused to undertake.

Moreover, the judicial self-limitation represented by the rule that courts will not normally decide political questions is based in large part on the necessity for unity of action in the conduct of foreign affairs. *Curtiss-Wright Corp.* v. *United States*, 299 U.S. 304, 319 (1936). However, when the political decisions of executive agencies are so diverse as in the case of Denmark's alleged neutrality, then there is strong reason for the courts to interfere, especially when the decision as to neutrality has no support in the circumstances. Neutrality implies a total abstinence from war and an impartiality of conduct toward belligerents. *The Three Friends*, 166 U.S. 1, 51, 52 (1896). No one who fully reviews the history of Denmark can conclude that it was neutral in World War II. In like circumstances with regard to Palestine which the Selective Service System designated as neutral, judicial intervention was held warranted to reach the conclusion that the country was improperly so classified. *Petition of Ajlouny*, 77 F. Supp. 327 (E.D. Mich. 1948). In addition, the determination of the Selective Service System that Denmark was a neutral nation was not in the exercise of a function of foreign affairs, but rather it was a determination interpreting its own regulations as to the liability of an alien resident of the United States to service in the armed forces. Hence, the issue of Denmark's neutrality for the purposes of the present petition is not strictly a political issue. Cf. *Shachtman* v. *Dulles*, 225 F. 2d 938, 940 (C.A.D.C. 1955). The question whether the petitioner was a neutral alien would therefore be as justiciable as the question whether he would have been a resident alien. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950) or whether an agency complied with its regulations.

Conclusion

In view of the conflict between the instant case and *Moser* v. *United States*, 341 U.S. 41; in view of the fact that the present case presents the same issue as *Ceballos* v. *Shaughnessy*, No. 71, October 1956 Term; in view of the important issue of pleadings and practice involved herein in denying the petitioner an opportunity to fully perfect his case in the District Court, and in view of the rulings below refusing judicial review of asserted agency non-compliance with its own regulations, it is respectfully submitted that certiorari should be granted.

JACK WASSERMAN,
902 Warner Building,
Washington 4, D. C.,
Attorney for Petitioner.